PUBLIC PROSECUTOR v. CHEN GEOK LEN & ANOR.

[A.Cr.J. (Lee Hun Hoe J.) August 9, 1966]

[Sibu — Criminal Appeal No. 7 of 1966]

Criminal Law and Procedure — Affray — Definition — Public place — Whether hotel can be a public place — Interpretation Ordinance, (Sarawak Cap. 1), s. 3 — — Minor Offences Ordinance (Sarawak Cap. 56), s. 33.

This was an appeal by the public prosecutor against the acquittal of the respondents who were charged with committing the offence of affray in a hotel. The learned magistrate held that a hotel could not be regarded as a public place and therefore the offence of affray could not be established.

Held: (1) the meaning of public place depends to a great extent upon the context and the object of a particular Ordinance and a public place would seem to include a place to which the public are accustomed to resort without being interferred with though there is no legal right to do so;

(2) in this case the learned magistrate should have heard the evidence before deciding that the hotel was not a public place and therefore there must be a new trial.

Semble. The definition of "affray" in the Ordinance would appear to conflict with the definition by the House of Lords in *Button* v. *Director of Prosecutions* (1) and therefore should be reconsidered.

[**Editorial Note:** Section 159 of the Penal Code in Western Malaysia and Singapore states that when two or more persons, by fighting in a public place, disturb peace, they are said to "commit an affray".]

Cases referred to:—

(1) *Button* v. *Director of Public Prosecutions; Swan* v. *Director of Public Prosecutions* [1965] 3 W.L.R. 1131, 1134, 1137.

(2) *The Queen* v. *Wellard* (1884), 14 Q.B.D. 63, 66.

(3) *Laugrish* v. *Archer* (1882), 10 Q.B.D. 44.

CRIMINAL APPEAL.

C. J. Millar (Deputy Public Prosecutor) for the appellant.

Respondents in person.

Cur. Adv. Vult.

Lee Hun Hoe J.: This is an appeal against the decision of the police court, Sibu. The two respondents were charged with committing an offence of affray in a hotel punishable under section 33 of the Minor Offences Ordinance. They claimed trial. At the hearing but before any evidence was called by the prosecution the defence counsel submitted that a hotel could not be a public place. The prosecution contended that a public place meant any place to which the public had access. The trial magistrate agreed with the defence counsel that a hotel could not be regarded as a public place. He further stated that in the absence of this ingredient the offence of affray could not be established. He then discharged the respondents. The prosecution appealed.

There were two grounds of appeal. First, that the trial magistrate misdirected himself in holding that it was necessary to prove in the offence of affray that the incident occurred in a public place. Secondly, that the trial magistrate misdirected himself in holding that the hotel could not be a public place without hearing any evidence.

During the hearing of this appeal the learned deputy public prosecutor indicated that he would abandon his first ground. I think I understand his reason. The word "affray" is defined under section 3 of the Interpretation Ordinance (Laws of Sarawak, 1958 Revised Edition) to mean a disturbance of the public peace resulting from two or more persons fighting in a public place. The term "public place" is also defined under the said section. The said Ordinance came into force on 23rd May, 1953. The extent of its application is clearly stated in section 2 which reads:—

"2. (1) Save where the contrary intention appears the provisions of this Ordinance shall apply to this Ordinance and to any written law now or hereafter in force made by competent authority in Sarawak and to any instrument made or issued thereunder.

(2) This Ordinance shall be binding on the Crown".

An important and interesting case relating to this ground should not be allowed to pass. This is because I think the learned deputy public prosecutor was probably right when he mentioned that an error had infiltrated into our law in connection with the offence of affray. I refer to the case of *Button* v. *Director of Public Prosecutions; Swan* v. *Director of Public Prosecutions.*(1) In that case an annual dance was held in a private hall and only persons with tickets were allowed admission. During the dance some youths (including appellants) created a disturbance and fighting broke out. Appellants were charged with making an affray. During the trial, Mackenna J. sitting with a jury, appellants contended that it was a necessary ingredient of the offence of an affray that it should take place in a public place and that the dance hall was not a public place. On the other hand the respondent contended that it was not an ingredient of an affray that it should take place in a public place but that, if it was, the dance hall was a public place. The learned judge felt bound by recent authorities to hold that an affray must be in a public place. However he directed the jury that they were entitled to find that the dance hall was a public place if on the occasion a substantial part of the public had access to it. The appellants were convicted. On appeal the Court of Criminal Appeal held that an affray did not have to be in a public place. In dismissing the appeal the House of Lords held that the common law offence of an affray had been a recognised offence long before the nineteenth century. It consisted of two or more persons fighting together to the terror of the Queen's subjects and need not be committed in a public

place. It is interesting to observe that the House of Lords corrected an error which crept into the law through *Blackstone* that only in acts done in a public place could there be a conviction for affray.

Lord Gardiner L.C. delivered the main judgment with which the other eminent and learned members of the House of Lords concurred. After referring to the arguments of the parties and the earlier authorities on the subject of affray he stated at page 1134:—

"that it was not an ingredient of it that it should take place in a public place and that Blackstone fell into error and was followed by later authors and, erroneously, in the decisions relied upon by the appellant".

He went on to say that:—

"the essence of the offence is that two or more fight together to the terror of the Queen's subjects. Nowhere in the earlier writings is it suggested that the place where the fight occurs is a decisive matter".

Before he dismissed the appeal he concluded his judgment in these words:—

"The most powerful argument for the appellants is that afforded by the lapse of over a century since the error crept into the law. During that peroid one may assume that prosecutions and trials have been based on the hypothesis that only in respect of acts done in a public place can there be a conviction for affray. But no alteration of the surrounding law has been founded on that hypothesis, nor can it properly be regarded as an intentional development of the law of affray. The only result of it has been that during that period the citizen who has been the victim of affray in a private place has in practice been deprived of the protection of the law. That is not in itself any reason to continue the deprivation. Moreover, there is no argument of principle or logic to gild the error. In riot and assault, two kindred offences which legal writers have so often treated in association with affray, there is no requirement that they should be committed in a public place. To distinguish affray in this respect is captious and illogical. There seems, therefore, no adequate reason to perpetuate the error".

It is only right that the attention of the legislature should be drawn to our definition of "affray" which conflicts with the decision of the highest English authority. If such an error had also crept into our law then obviously step must be taken to remedy it.

I come now to the second ground of appeal. In *The Queen* v. *Wellard* [2] the prisoner was convicted of indecently exposing his person to some small girls in a place which was out of sight off a public footpath. The prisoner had gone to the place with several little girls though without legal right to go there. This was a place where persons were in the habit of going without having any strict legal right so to do and were never in any way hindered or interfered with. On a case stated his counsel submitted that the place was not a public place as the public had no right there and that a place was not public where the public had no right to be. It was held that the conviction was correct and the jury were justified in finding that the place was public. Lord Coleridge C.J. in his judgment in *Wellard's* case stated:—

"It is, I concede, difficult to define affirmatively what is a public place; this place, however, is clearly so. The public did undoubtedly have access to it. I am by no means sure that at common law the publicity of the place itself is an essential element in the offence, and I am not inclined now to say so: it is not necessary to decide this question. It is obvious that what is a public place may vary from time to time, and what we have to consider is, was this place at the time public?"

Grove J. in the same case stated:—

"A public place is one where the public go, no matter whether they have a right to go or not. The right is not the question. Many shows are exhibited to the public on private property, yet they are frequented by public — the public go there".

The meaning of public place, I think, depends to a great extent upon the context and upon the object of a particular Ordinance. A place may be a public place at one time and not at other times. Thus a railway carriage is a public place while being used for the reception and conveyance of passengers, but not while it lies empty in a siding. *Laugrish* v. *Archer.* [3] *Wellard's* case appears to be authority for saying that a public place would seem to include a place to which the public are accustomed to resort without being interfered with though there is no legal right to do so. *Button's* case would seem to suggest that a place could be a public place if at the time a substantial part of the public had access to it.

In my opinion the trial magistrate should have heard the evidence before making a decision. For reasons given I allow the appeal and order a new trial before another magistrate.

Appeal allowed. New trial ordered.

BERNARD LEOW KIM HOON v. MALAYAN AIRWAYS/QANTAS EMPIRE AIRWAYS LOCAL EMPLOYEES UNION & ORS.

[O.C.J. (Buttrose J.) August 10, 1966]

[Singapore — Civil Suit No. 589 of 1966]

Trade Union — Elections to executive committee — Executive committee elected by persons some of whom had no voting rights — Marked ballot papers — Whether elections valid.

The plaintiff sought a declaration that the purported election of the defendants 2 - 16 to the executive committee of the 1st defendant union was null and void and for consequential orders. Among the matters complained of was (a) that ballot papers were issued to members who had no voting rights; and (b) ballot papers were marked.

Held: (1) in accordance with the rules of the trade union only members who had paid their subscription and not let them fall into arrears for more than three months were entitled to vote and as in this case there was a considerable number of members in arrears of their subscription for more than three months who voted, the election could not be allowed to stand;